IN THE

Supreme Court of the United States

October Term, 1958

No. 195

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS, *Petitioner*,

v.

NOLAN LEE BUSH, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI To the Court of Civil Appeals, Third Supreme Judicial District of Texas, Sitting at Austin

BRIEF FOR RESPONDENT

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SUBJECT INDEX

	PAGE
OPINION BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTE INVOLVED	3
STATEMENT	3
REASON FOR GRANTING THE WRIT	4
ARGUMENT	4
CONCLUSION	11

LIST OF AUTHORITIES

CASES

Atlantic Coastline Railroad Co. v. Kammerer, 239 F. 2d 115	10
Chicago, Rock Island & Pacific Railway Co. v. Kifer, 216 F. 2d 753	10
Chicago, Rock Island & Pacific Railroad v. Williams, 245 F. 2d 397	10
Ft. Worth & Denver Railway Co. v. Harris, 230 F. 2d 680	10
Home Insurance Co. of New York v. Tydal Co., 5 Cir., 152 F. 2d 309	10
Hulett v. Brinson, 229 F. 2d 22, 25	9, 10
Lilie v. Thompson, 68 S. Ct. 140	2, 6, 8
Neece v. Southern Railway Co., 76 S. Ct. 131	10
Pinghiser v. C. & O. Railway Co., 77 S. Ct. 1093	5
Rogers v. Missouri Pacific Railroad Co., 77 S. Ct. 443	5, 9
Swift & Co. v. Eleanor, 5 Cir., 101 F. 2d 131, 132	10

UNITED STATES STATUTES

45 U.S.C.A. 51	3

TEXTS

33 A.L.R. 2d 1287-1315	7

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BRIEF FOR RESPONDENT

To: The Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

Nolan Lee Bush, Respondent herein, respectfully presents this brief in opposition to the Petition for Writ of Certiorari.

Opinion Below

The opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas was handed down February 5, 1958, and appears in 310 S.W. 2d 404, styled Missouri-Kansas-Texas Railroad Company of Texas v. Bush. There is no opinion of the Supreme Court of Texas, but it refused Petitioner's Application for Writ of Error on May 14, 1958.

Jurisdiction

Petitioner improperly seeks to invoke the jurisdiction of this Court. Under Supreme Court Rule 19(1)(a) there is no special and important reason for granting a review on writ of certiorari, nor is the opinion of the State Court of Texas a determination of a Federal question of substance not theretofore determined by this court. The precise question raised by Petitioner was determined by this Court in *Lillie v. Thompson*, 68 S. Ct. 140. The decision of the Texas Court in no way violates the holding of that case. It would therefore seem that under Supreme Court Rule 19(1)(a) that this court would not take jurisdiction within its judicial discretion.

Question Presented

The Federal question presented here in a State Court suit brought under the Federal Employers' Liability Act is whether the defendant railroad failed, in whole or in part, to furnish the plaintiff with a reasonably safe place in which to work.

Statute Involved

The Statute involved is Section 51, Title 45, U.S.C.A., known as the Federal Employers' Liability Act.

Statement

The Respondent, who was the Plaintiff in the trial court, in his petition alleged that the Petitioner (Defendant) had failed to furnish the Plaintiff a reasonably safe place in which to work and that such failure on the part of the Defendant resulted in whole or in part in the Plaintiff's injuries. In support of these allegations, evidence established that the danger to the Plaintiff and others similarly situated could have been reasonably foreseen by an ordinary, prudent person in the exercise of ordinary care. Some eight witnesses testified as to their experiences riding in the cabooses of the defendant railroad performing their duties where they experienced rocks and other objects being thrown or propelled into the caboose where they were working. These witnesses testified concerning the reporting of these incidents. In addition, these witnesses testified about the specific dangers being discussed in safety meetings held and conducted by the defendant railroad where specific requests were made from time to time for safety devices that would protect these men as they performed their duties. There was additional testimony of the type of safety devices used by other railroads to protect employees from thrown objects and to provide employees with a reasonably safe place in which to work. Evidence was introduced as to other means the defendant could have taken to protect its employees from similar occurrences.

These were the facts of the case as it was presented to the jury and upon which they found, in answer to special issues, that the defendant railroad failed to provide the plaintiff with a reasonably safe place in which to work.

Reason For Not Granting Writ

The reason for denying the Writ of Certiorari in this instance is because the decision of the Court of Civil Appeals of Texas is correct and is in conformity with previous decisions of this Court.

Argument

I. The decision of the Court of Civil Appeals of Texas is correct and in conformity with previous decisions of this Court.

Judgment was properly entered for the Respondent upon the verdict of the jury, since under the law, the proof showing what it did, it was a question of fact for the jury to decide whether or not the Petitioner furnished the Respondent with a reasonably safe place in which to work and whether or not such failure on the part of the defendant was a proximate cause in whole or in part of the Respondent's injuries. The jury having so found, the failure to enter judgment for the Respondent, and the entering of the judgment for the Petitioner instead, would have amounted to an usurpation of the jury function by the court.

In essence, the Petitioner is stating two points, one being that inasmuch as a criminal act was committed the Petitioner cannot be held responsible, and, secondly, under the

facts of the case, the Petitioner could not have reasonably foreseen the act resulting in damage to the Respondent. We submit, with respect to the question of foreseeability, that the recent case of *Ringhiser v. C. & O. Railway Company*, 77 S. Ct. 1093, and *Rogers v. Missouri Pacific Railroad Company*, 77 S. Ct. 443, hold to the contrary to the contention raised by Petitioner. It will be remembered that in the *Rogers* case the court construed the Federal Employers' Liability Act and said:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. . . . Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part* (to its) negligence.'" (Emphasis added)

The Petitioner further contends that because the object that destroyed the Respondent's vision and caused his injuries was thrown in violation of a criminal statute there could be no negligence on its part. It is argued by Petitioner that this precludes foreseeability and proximate cause. Such is not the law of the case. The F. E. L. A.

requires that such injury be caused "in whole or in part" by the employer and the Federal decisions have long since rejected the proposition as contended.

The leading case is *Lillie v. Thompson*, 68 S. Ct. 140. In this case the plaintiff was a 22-year old female telegraph operator employed by the defendant railroad. She worked alone from 11:30 p.m. until 7:30 a.m. in a one-room frame building situated in an isolated part of defendant's railroad yards, a place which defendant had reason to know was frequented by dangerous characters. In performing her duties, plaintiff was required to admit the trainmen when they came into the building; there were no windows on the door side of the building and the plaintiff could not identify anyone who knocked without opening the door. About 1:30 a.m. on the night of her injury, she responded to a knock, opened the door and was attacked by a man with a piece of iron and was seriously and permanently injured. The defendant filed a motion for summary judgment and alleged that the assailant was not an employee of the defendant and that the attack was a criminal act, which allegations were not denied by plaintiff. The district court entered judgment for the defendant and the Court of Appeals affirmed. The Supreme Court granted certiorari, reserved the judgment and remanded the case to the district court for trial. In its opinion the Supreme Court said:

> "The district court stated, in explanation of its action, that there would be no causal connection between the injury and the respondent's failure to light or guard the premises, and that the law does not permit recovery 'for the intentional or criminal acts' of either a fellow-employee or an outsider.

> "We are of the opinion that the allegations in the complaint, if supported by evidence, will warrant submission to a jury. Petitioner alleged in effect that respondent was aware of conditions which created a likelihood that a young woman performing the duties required of petitioner would suffer just such an injury as was in fact inflicted upon her. *That the foreseeable danger was from intention or criminal misconduct is irrelevant;* respondent nonetheless had a duty to make reasonable provision against it. Breach of that duty would be negligence, and we cannot say as a matter of law that petitioner's injury did not result at least in part from such negligence." (Emphasis added)

It is interesting to note the opinion in the *Lillie* case, at Footnote 3, refers to the authorities relied upon by Petitioner as being the basis for the District Court's judgment, which it overruled.

The entire question of the liability of an employer under the Federal Employers' Liability Act for bodily injuries suffered by an employee resulting from the intentional misconduct of a third person is discussed at great length in Vol. 33 A. L. R. 2d, pg. 1287-1315. A case reported in A. L. R. is *Tatham v. Wabash Railroad Company,* 107 N.E. 2d 735. The reported decision is one from the Supreme Court of the State of Illinois. The suit was one for damages for bodily injuries suffered by a railroad employee through an assault by a co-worker. The pleadings alleged that the employer when it employed the co-worker, knew that he was a vicious, contentious, pugnacious, ill-tempered person who was quarrelsome and frequently engaged in physical combats; thereby creating an unreasonable danger to the plaintiff and other employees.

The Supreme Court of Illinois, in passing on this question, discusses each of the authorities referred to by the Supreme Court of the United States in the *Lillie* case, *supra*, and concludes that the *Lillie* case is controlling. The Illinois opinion historically analyzes the entire question and then concludes that the decision in the *Lillie* case has clarified the entire picture. The Illinois court concluded:

> "It is squarely held that an employer may be liable for a negligent breach of duty even though 'the foreseeable danger was from intentional or criminal misconduct.' In our opinion, the clear and obvious holding of the Lillie case is that when an employer is aware, or should be aware, of conditions creating a likelihood of injury, he has a duty to make provisions against this foreseeable danger, even though the threatened hazard is from the intentional misconduct of third persons."

The Petitioner in the case at bar has cited no case overruling the *Lillie* case. The *Lillie* case was cited with approval by this Court in the recent *Rogers* decision, *supra.*

In light of the above it is respectfully urged that this Honorable Court deny the Petition for Writ of Certiorari by Petitioner.

II. There are no grounds under Rule 19 of this Court for granting a Writ of Certiorari.

A. The decision is not in conflict with the decision of this or other courts.

As has been demonstrated heretofore, the decision of the Court of Civil Appeals of Texas is not in conflict with the prior decision of this Court or of other Federal Courts.

It follows the spirit as well as the letter of the law as laid down by this Honorable Court in the *Lillie* case, *supra.*

B. *This is not a decision of an important state question in conflict with applicable state law.*

Since this case involves a Federal question, there is no decision of important state question in conflict with applicable state law.

C. *The decision presents no important question of Federal Law.*

D. *The question of excessive damages presents no important question of Federal law.*

Petitioner, without comment or authority, states in its petition to this Court that the award of the jury as to damages is excessive. It asserts this as a reason for this Court to grant certiorari.

With respect to this type of proposition, this Court has previously determined that where probative facts support with reason a verdict favorable to Petitioner that the decision is exclusively for the jury to make. *Rogers v. Missouri Pacific Railroad Co.*, 77 S. Ct. 443. In addition, this Court has consistently held that in a tort action such as this the question of the excessiveness of a verdict is a question to be determined by the trial court on motion for new trial, and cannot be considered as a ground for reversal. The question of Federal jurisdiction is stated clearly in the case of *Hulett v. Brinson*, 229 F. 2d 22, 25, as follows:

> "In state courts there is apparently an established practice of ordering a remittitur in appellate courts, even in tort cases where the damages are unliquidated;

but in federal jurisdictions the practice seems to be limited to contract cases and the like, where the excess amount of the verdict can be farily well determined. No case has been found in a federal jurisdiction where an appellate court undertook to cure by remittitur an excessive verdict rendered in a tort action for unliquidated damages.

"In the recent case of National Alfalfa Dehydrating & Milling Co. v. Sorenson, 8 Cir., 1955, 220 F. 2d 858, the court, citing Glendenning Motorways v. Anderson, 8 Cir., 1954, 213 F. 2d 432, held that in the Federal courts alleged excessiveness of verdict in tort cases was not reviewable on appeal.

"It appears clear that the rule in the Federal courts is that an appellate court may reverse, if at all, for excessiveness of verdict only where the verdict is so grossly excessive or monstrous as to demonstrate clearly that the trial court has abused its discretion in permitting it to stand."[1],[2]

The decision presents no important question of Federal law which has not already been decided since the law is clearly followed by the decision in question.

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[1] See **Swift & Co. v. Eleanor,** 5 Cir., 101 F. 2d 131, 132; **Home Insurance Company of New York v. Tydal Company,** 5 Cir., 152 F. 2d 309; **Ft. Worth & Denver Railway Company v. Harris,** 230 F. 2d 680; **Chicago, Rock Island & Pacific Railway Company v. Kifer,** 216 F. 2d 753; **Neece v. Southern Railway Co.,** 76 S. Ct. 131; **Chicago, Rock Island & Pacific Railroad v. Williams,** 215 F. 2d 397.

[2] This same conclusion is stated in **Atlantic Coastline Railroad Co. v. Kammerer,** 239 F. 2d 115, wherein it states: "Moreover, ours is a narrow review for 'Limited as it is by the Seventh Amendment, * * * [this Court's] * * * power and duty extend only to cases in which the verdict is excessive as matter of law, that is, is so gross or inordinate in amount as to be contrary to right reason.'"

Conclusion

For the foregoing reasons Respondent urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Certificate of Service

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